

Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part 2)

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OPSOMMING

Enkele praktiese en vergelykende aspekte van die kansellasië van afbetalingsooreenkomste ingevolge die Nasionale Kredietwet 34 van 2005

Teen die agtergrond van die toepassingsgebied van die Nasionale Kredietwet 34 van 2005 behandel hierdie artikel sekere praktiese aspekte met betrekking tot die kansellasië van 'n afbetalingsooreenkoms ingevolge dié Wet deur die proses onder andere met die voormalige Wet op Kredietooreenkomste se kansellasiëbepalings rakende 'n afbetalingsverkooptransaksie ingevolge daardie Wet kortliks te kontrasteer. Verder word die proses, insluitende sommige probleemassekte rakende die 2005 Wet, behandel. Die skrywers maak sekere aanbevelings rakende die praktiese hantering van 'n kansellasië van 'n afbetalingsooreenkoms in die lig van bepaalde uitlegprobleme en waarskynlike leemtes ingevolge laasgenoemde Wet.

4 Debt Enforcement Measures in Terms of the Act

4 1 General

The features of the instalment agreement¹²⁷ render it one of the more commonly used consumer credit contracts for the sale of movable goods.¹²⁸ The debt enforcement measures in the Act are therefore considered by paying special attention to this type of contract.

¹²⁷ Referring to the right of the seller to reserve the ownership of the goods until payment of the final instalment or to repossess the goods should the buyer commit breach of contract – see par 3 2 above. In practice most credit providers would probably choose to reserve the ownership of the goods in the agreement until payment of the final instalment due to the problems that may present themselves should the buyer immediately become the owner of the goods subject to the right of the credit provider to repossess the goods. The buyer may eg as owner of the goods, alienate the goods to a third party. See in this regard Diemont and Aronstam 272.

¹²⁸ This is especially true regarding more expensive consumer goods like motor vehicles and furniture. See Otto *The National Credit Act Explained* (2006) 18.

When a consumer defaults while in possession of movable property sold in terms of an instalment agreement to which the Act applies, the credit provider must determine which rights he or she wants to enforce, if the Act allows him or her to exercise such rights and whether such rights are limited in any way. The credit provider may for instance, decide to either claim instalments in arrears or to cancel the agreement and repossess the property sold to the consumer. In both instances a claim for damages¹²⁹ may be instituted as a combination remedy.¹³⁰ The discussion below, however, focuses on the cancellation of instalment agreements and concomitant claims for the return of the goods.

Chapter 6 of the Act deals with collection, repayment, surrender and debt enforcement. Part C of Chapter 6, sections 129–133, deals with debt enforcement by way of repossession or judgment in particular. The ordinary enforcement procedures provided for by the law of civil procedure must thus be read in conjunction with these provisions in order to ensure compliance by the credit provider with the relevant prescriptions of the Act.

The question is whether the phrase “debt enforcement” in Chapter 6 Part C should be interpreted in a wide sense so as to include the cancellation of credit agreements, or whether a narrow meaning should be attached to the words to mean the enforcement of the contract by means of a claim for specific performance only. It is our submission that the broader meaning should be given to the phrase so as to include cancellation of the contract as well.¹³¹

As there is a certain degree of interplay between the Act’s provisions regarding the procedures for debt review on the one hand, and debt enforcement procedures on the other,¹³² cognisance has to be taken of the consumer’s right¹³³ to apply for the review of his or her debt¹³⁴ by a debt counsellor.¹³⁵

129 If any damages were suffered as a result of the breach of contract.

130 See in general par 2 1 above.

131 Any other interpretation would mean that ss 129–133 do not apply if the credit provider elects to cancel the credit agreement. The implication is that should the agreement contain a *lex commissoria*, no notice (see par 4 2 1 below) to the consumer is required in order to cancel the agreement (unless of course the contract requires notice despite the *lex commissoria*). Substantiation of our argument is to be found in the wording of s 123(2) that affords the right to the credit provider to take the steps set out in Ch 6 Part C to enforce and terminate the agreement if the consumer is in default. In the context “terminate” can only mean cancellation. It is also notable that the heading of Part C Ch 6 of the Act refers to “[d]ebt enforcement by repossession or judgment” which serves as another indication that ss 129–133 apply to cancellation as well due to the fact that cancellation is a prerequisite for “repossession”. See Otto 87–88 who also holds the view that a wide meaning should be attached to “enforcement.” (Otto mentions s 129(3) in addition to s 123(2) in this respect. S 129(3) affords the right to the consumer to reinstate the agreement at any time before the “cancellation” thereof by the credit provider – see also par 4 6 3 below).

132 See par 4 2 below.

133 In terms of s 86.

134 One of the aims of the Act is *inter alia* to protect consumers by addressing and preventing over-indebtedness and by providing mechanisms for resolving
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4 2 Prerequisites for Debt Enforcement by Means of Legal Proceedings

4 2 1 Notification Requirements

Section 129(1)(a) prescribes in general terms that when the consumer is in default under a credit agreement, the credit provider *may* in writing draw the default to the attention of the consumer and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent,¹³⁶ consumer court¹³⁷ or ombud with jurisdiction,¹³⁸ with the intent that the parties may resolve any dispute under the agreement, or develop and agree on a plan to bring the payments in arrears under the agreement up to date.

Section 129(1)(b) then states unequivocally that, subject to section 130(2),¹³⁹ the credit provider may not commence any legal proceedings to enforce the credit agreement before a notice has been provided as contemplated in either section 86(10) or section 129(1)(a), whichever may apply, and only if any further requirements set out in section 130¹⁴⁰ are met.¹⁴¹ It is therefore clear that the institution of legal proceedings must be preceded¹⁴² by either a section 129(1)(a) or a section 86(10) notice.¹⁴³

over-indebtedness – s 3(g). Therefore, for the first time in the history of South African consumer credit legislation, specific provision is being made for measures to combat reckless credit lending and over-indebtedness – Part D Ch 4. Provision is also being made for over-indebted consumers to improve their position over time, *inter alia* by instituting a debt counselling scheme.

- 135 The “debt counsellor” is a new role player in the credit industry introduced by the Act. Only registered persons may act as debt counsellors – s 44(2).
- 136 Defined in s 1 as a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration.
- 137 Established by provincial legislation – s 1. These courts still have to be established.
- 138 Meaning the ombud for financial institutions where the credit provider to the particular credit agreement is a financial institution – s 1.
- 139 Discussed in par 4 2 2 below.
- 140 The s 130 requirements (discussed in par 4 2 2 below) therefore also have to be complied with in instances where the s 86(10) procedure is followed.
- 141 S 129(2) determines that ss 129(1)(a) and (b) do not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings that could result in such an order. It is therefore our opinion that should a consumer be in default with regard to a credit agreement that is subject to debt review or debt re-arrangement and the credit provider wants to enforce such an agreement by litigation or other judicial process (in accordance with s 88(3)), compliance with s 129(1) is not required. (It is not clear what is meant by “or to *proceedings* that could result in such an order”. It is submitted that a restricted meaning needs to be given to the word “proceeding” so as to limit it to court proceedings that may result in the granting of a debt restructuring order, otherwise this section would be nonsensical.)
- 142 The word “may” is used in ss 86(10) and 129(1)(a). We propose that the word “may” in ss 86(10) and 129(1)(a) must be interpreted as “must” unless the legislature used the word “may” in both sections to indicate that notice has to be given in terms of the one section or alternatively in terms of the other section.
- 143 Compliance with the s 86(10) or s 129(1)(a) notice therefore forms part of the *facta probanda* in an action for specific performance or cancellation and the return of the goods, etc.

If a consumer is in default under a credit agreement in terms of which debt review¹⁴⁴ is already under way, the credit provider may use a section 86(10) notice¹⁴⁵ to terminate the debt review. Such notice must be given to the consumer, the relevant debt counsellor and the National Credit Regulator¹⁴⁶ and may be given at any time at least 60 business days after the date on which the consumer applied for the debt review.¹⁴⁷ After such notice has been given by the credit provider to terminate the debt review, he or she may apparently proceed to enforce such credit agreement in terms of Part C of Chapter 6¹⁴⁸ but the magistrate's court hearing the matter may order the debt review to resume on any conditions that the court considers to be just in the circumstances.¹⁴⁹

As a section 86(10) notice is required in instances where the credit provider wants to enforce a credit agreement that is already subject to an application for debt review, a section 129(1)(a) notice will be required in those instances where the matter is not subject to debt review. The section 129(1)(a) procedure will probably be more prevalent in practice and will thus receive more attention in the discussion below.

Section 129(1)(a) merely states that if the consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing together with the prescribed proposals. It is submitted that although the section refers to certain proposals that the credit provider may include in this notice, the notice could in practice also serve as the "final" letter of demand before summons will be issued against the consumer. The facts of each case, and in particular the clauses contained in the relevant credit agreement, will determine what particulars need to be included in the section 129(1)(a) notice to either provide the credit provider with a cancellation of the agreement or with the right to cancel¹⁵⁰ the agreement and related relief. This is of course very important

144 In terms of s 86.

145 The notice has to be given in the prescribed manner. At present the Regulations to the Act contain no provisions in this regard.

146 The National Credit Regulator was established by s 12 of the Act. The Regulator is *inter alia* responsible for the enforcement of the Act by *inter alia* receiving complaints concerning alleged contraventions of the Act – s 15.

147 The particular debt counsellor is therefore afforded 60 business days to complete the debt review process in terms of s 86 – see also reg 24–26 regarding prescribed time periods.

148 Debt review and debt enforcement can therefore not apply simultaneously with regard to the same credit agreement. Credit providers would probably make use of the s 86(10) procedure to terminate debt review in the event of misuse by consumers of the debt review process. See also Otto 85–87 for a discussion of the interplay between debt review and debt enforcement.

149 S 86(11).

150 If the credit agreement contains a *lex commissoria* the credit provider may, strictly speaking, cancel the agreement immediately without a warning to the consumer of the intention to cancel the agreement should the breach of contract not be rectified. This is due to the fact that the *lex commissoria* (depending on its wording) may entitle the credit provider to do so. In such an instance the s 129(1)(a) notice, which is still required to repossess the goods, merely serves to inform the consumer that the agreement has been cancelled by the credit provider. However, it

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since the credit provider must ensure that there is a clear right to cancel the agreement and to claim related relief should it become necessary to proceed to the summons in order to enforce his or her rights. The notice must thus, apart from the information that is set out in section 129(1)(a), be clear on the breach of contract committed by the consumer and the consequences thereof.

Section 129(1)(b) states that the credit provider may not commence any legal proceedings to enforce the credit agreement before first providing a section 129(a) notice to the consumer. However, section 129(1)(a) and (b) does not state how such notice should be “provided” to the consumer. section 130(1)(a) provides that at least ten business days must have elapsed since the credit provider “delivered” the notice to the consumer. Although the Act contains a provision regarding serving¹⁵¹ of documents, notices *etcetera*, we submit that the section 129(1)(a) “letter of demand” should be delivered in terms of section 65. Section 65(1) determines that every document that is required to be delivered to a consumer in terms of the Act must be delivered in the prescribed manner, if any. As the Regulations to the Act do not prescribe a method of delivery of a section 129(1)(a) notice, such notice has to be made available to the consumer in person,¹⁵² by ordinary mail, fax, e-mail or printable web-page. The document then has to be delivered to the consumer in the manner chosen by him or her from the different options.¹⁵³

4 2 2 Other Prerequisites

Should a debtor be in default in terms of his or her contractual obligations and debt review is not subsisting, a section 129(1)(a) notice¹⁵⁴ is required to enforce the debt. However, in terms of section 130(1) a credit provider

seems to be a more sound argument that even though the contract contains a *lex commissoria*, compliance with s 129(1)(a) read with s 129(1)(b) is a requirement for cancellation of the contract – see Otto’s argument in par 2 2 3 above. If there is no *lex commissoria* in the agreement, the credit provider first has to acquire the right to cancel the agreement by delivering a notice of rescission to the consumer allowing him or her another opportunity to perform within a reasonable time. It is submitted that the s 129(1)(a) notice may also be used to acquire the right to cancel the agreement.

151 In terms of s 168. S 168 provides that unless otherwise provided in the Act, a notice, order or other document that must be served on a person in terms of the Act, will have been properly served when it has either been delivered to that person or sent by registered mail to that person’s last known address. It is our submission that s 168 ought to apply only where the “serving” of the document is required.

152 At the business premises of the credit provider, or at any other location designated by the consumer but at the consumer’s expense.

153 S 65(2). Delivery through ordinary mail is less secure than delivery through registered mail. This explains why the choice regarding the method of delivery is left to the consumer. In comparison to the Act’s prescriptions, delivery of the s 11 Credit Agreements Act notice (which was also, like the s 129(1)(a) notice, required to complete the credit grantor’s cause of action) had to be effected in person or by registered mail – see par 2 2 3 above.

154 See par 4 2 1 above.

who has given notice as required may only approach the court¹⁵⁵ for an enforcement order of the credit agreement if at that time¹⁵⁶ the consumer is in default and has been in default under the credit agreement for at least twenty business days. It is further required that at least 10 business days have elapsed since the credit provider delivered the section 129(1)(a) notice¹⁵⁷ to the consumer¹⁵⁸ and that the consumer has not responded to the notice or responded to the notice by rejecting the proposals made by the credit provider.¹⁵⁹

In the case of an instalment agreement, secured loan or lease there is an additional requirement that the court may only be approached to enforce the agreement if the consumer has not yet surrendered the relevant property¹⁶⁰ to the credit provider.¹⁶¹

155 We submit that the court needs to be approached by means of summons in this regard.

156 The time of the approach.

157 Or the s 86(10) notice (discussed in par 4 2 1 above) as the case may be. S 130(1)(a) refers to a notice as contemplated in s 86(9). This is clearly incorrect and should be a reference to s 86(10).

158 S 130(1)(a).

159 S 130(1)(b).

160 In terms of s 127. In brief, s 127 provides that a consumer under an instalment agreement, secured loan or lease may give written notice to the credit provider to terminate the agreement. If the goods under the agreement are already in the credit provider's possession, the consumer may require the credit provider to sell the goods. Otherwise the consumer has to return the goods to the credit provider in order for the goods to be sold. The credit provider must then give the consumer written notice setting out the estimated value of the goods. Upon receiving this notice the consumer may unconditionally withdraw the notice to terminate the agreement and resume possession of any goods that are in the credit provider's possession, unless the consumer is in default under the agreement (in which case it appears the s 127 procedure will have to be followed until the end). If the consumer does not withdraw the notice to terminate the agreement the credit provider will sell the goods and do the necessary accounting of the proceeds of the sale. Depending on the settlement value of the agreement and the proceeds of the sale, the credit provider has to either remit the balance to the consumer (whereupon the agreement is terminated) or may demand payment from the consumer of the remaining settlement value. If the consumer fails to pay such an amount demanded, the credit provider may commence proceedings in terms of the Magistrate's Courts Act for judgment enforcing the agreement (the right of the credit provider to approach the court for an order enforcing the remaining obligations of the consumer is reiterated by s 130(2)). See Otto 95–97 for a discussion of the credit provider's right in this regard. It is submitted that a s 129(1)(a) demand notice is not required where the credit provider approaches the court for an order enforcing the remaining obligations of the consumer as s 129(1)(b) requiring such a notice clearly states that the requirement is subject to s 130(2)). However, if the consumer pays the demanded amount at any time before judgment is obtained, the agreement is terminated. S 128 affords rights of review and compensation to a consumer who has unsuccessfully attempted to resolve a disputed sale of goods directly with the credit provider or through alternative dispute resolution.

161 S 130(1)(c). Should the consumer have surrendered the property to the credit provider, the credit provider has to follow the s 127 procedure discussed above.

The legislature further stipulates that in any proceedings commenced in a court in respect of a credit agreement to which the Act applies, the court *may* only determine the matter if the court is satisfied that

- “(a) in the case of proceedings to which sections 127,¹⁶² 129¹⁶³ or 131¹⁶⁴ apply, the procedures required by those sections have been complied with;¹⁶⁵
- (b) there is no matter arising under that credit agreement, and pending before the Tribunal,¹⁶⁶ that could result in an order affecting the issues to be determined by the court;¹⁶⁷ and
- (c) that the credit provider has not approached the court¹⁶⁸
 - (i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or
 - (ii) despite the consumer having
 - (aa) surrendered property to the credit provider, and before that property has been sold;
 - (bb) agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement;
 - (cc) complied with an agreed plan as contemplated in section 129(1)(a); or
 - (dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a)”.

The legislature subsequently prescribes what a court has to do in any proceedings contemplated in section 130. Should the court determine that

- “(a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;¹⁶⁹
- (b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in section 130(3)(a),¹⁷⁰ or has approached the court in circumstances contemplated in section 130(3)(c)¹⁷¹ the court must—
 - (i) adjourn the matter before it; and
 - (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;¹⁷²
- (c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may
 - (i) adjourn the matter, pending a final determination of the debt review proceedings;
 - (ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or

162 Discussed above.

163 Discussed in par 4 2 1 above.

164 Discussed in par 4 3 below.

165 S 130(3)(a).

166 Meaning the National Consumer Tribunal established by s 26; s 1.

167 S 130(3)(b).

168 S 130(3)(c).

169 S 130(4)(a).

170 Discussed above.

171 Discussed above.

172 S 130(4)(b).

- (iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b);¹⁷³
- (d) there is a matter pending before the Tribunal, as contemplated in section 130(3)(b),¹⁷⁴ the court may
 - (i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or
 - (ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination,¹⁷⁵ or
- (e) the credit agreement is either suspended or subject to a debt re-arrangement order or agreement,¹⁷⁶ and the consumer has complied with that order or agreement, the court must dismiss the matter”.¹⁷⁷

4 3 Procedure Subsequent to Attachment

Section 131 determines that if a court makes an attachment order with respect to property that is the subject of a credit agreement, sections 127(2) to (9) and 128¹⁷⁸ apply¹⁷⁹ with respect to any goods attached in terms of that order. Section 131 merely provides prescriptions with regard to the execution and realisation process to be followed after attachment of goods following an attachment order.¹⁸⁰ A summons for the cancellation of the instalment agreement will usually also include a prayer for restitution of the goods. Following judgment and attachment of such goods the procedure prescribed by section 131 of the Act should then be followed to realise the goods.

4 4 The Practical Effect of Section 129(1)(a) on the Debt Enforcement Process and Time Periods

The effect of the section 129(1)(a)¹⁸¹ process on debt enforcement by the credit provider may best be illustrated by using the example of *inter alia* a consumer who defaults by not paying his instalments in terms of an instalment agreement to which the Act applies. Acting on the assumption that the credit provider is still the owner of the goods to which the agreement relates and that the goods are still in the consumer's possession, the credit provider would probably prefer to cancel the agreement and claim the return of the goods as well as any damages suffered.

173 S 130(4)(c).

174 Discussed above.

175 S 130(4)(d).

176 In terms of Part D ch 4.

177 S 130(4)(e).

178 Discussed in par 4 2 2 above.

179 Read with the changes required by the context.

180 S 131 clearly applies to any credit agreement to which the Act applies. Therefore, if goods are attached pursuant to an attachment order, the s 127 execution process has to be followed *mutatis mutandis*.

181 Read with ss 129(1)(b) and 130.

A consumer's default may be drawn to his or her attention by the credit provider as soon as the default occurs. This has to be done by means of a section 129(1)(a) notice.¹⁸² The notice will *inter alia* contain a proposal that the consumer refer the matter to a debt counsellor and require the consumer to respond to the notice by informing the credit provider whether the consumer accepts the proposals in the notice or not. The consumer will have to be afforded at least ten business days to respond to the notice.¹⁸³ If the consumer does not respond or responds to the notice by rejecting the credit provider's proposals, the credit provider may approach the court (in other words issue summons)¹⁸⁴ provided that on the day of the issuing of the summons the consumer is still in default and has been in default for at least twenty business days.¹⁸⁵ It is our submission that as soon as summons is issued by the credit provider, the consumer is barred from applying for debt review to a debt counsellor.¹⁸⁶ However, if the consumer has agreed¹⁸⁷ to a proposal in terms of section 129(1)(a),¹⁸⁸ the credit provider may not issue summons.¹⁸⁹

If the required relief is granted by the court and the goods are repossessed as a result of an attachment order, the section 127 execution process has to be followed.

4 5 Aspects Relating to the Particulars of Claim

In view of the discussion above it is submitted that the following aspects need to be addressed in the particulars of claim of the credit provider plaintiff:

182 See par 4 2 1 above.

183 Ten business days have to elapse since the s 129(1)(a) notice before the court may be approached to enforce the debt.

184 Requesting the required relief.

185 If the credit provider delivers the s 129(1)(a) notice to the consumer as soon as breach of contract occurs, the credit provider will only have to wait (at least) twenty business days before summons may be issued. In this instance the ten business days (the period that has to elapse between the s 129(1)(a) notice and the summons) and the twenty business days (the minimum period that has to elapse between the date of the default and the summons) will run concurrently.

186 S 86(2) stipulates that an application for debt review may not be made in respect of a credit agreement if, at the time of the application, the credit provider under the credit agreement has proceeded to take the steps contemplated in s 129 to enforce the agreement. It is our submission that, as s 86(2) refers to steps contemplated in s 129 (in other words the whole of s 129 and by incorporation also s 130), and not only to the steps contemplated in s 129(1)(a), to enforce the agreement, the issue of the summons is meant. To interpret s 86(2) to read that the delivery of the s 129(1)(a) notice to the consumer means that the credit provider has proceeded to take steps to enforce the agreement (with the effect that no application for debt review may be made) would be nonsensical as it is proposed in the s 129(1)(a) notice that the consumer refers the matter to a debt counsellor. *Contra* Otto 85 who submits that the consumer's application for debt review is stayed from the moment that the credit provider draws his attention to the default in writing as required by s 129.

187 In other words the consumer has responded to the s 129(1)(a) notice.

188 And has acted in good faith to fulfil the agreement.

189 It is therefore our submission that the s 129(1)(a) notice, *inter alia*, has its purpose to inform the consumer about his or her right to apply for debt review.

- (a) Citation of the parties.¹⁹⁰
- (b) Jurisdiction of the relevant court.¹⁹¹
- (c) When, where and by whom the agreement was entered into¹⁹² as well as a description of the financed item and the purchase price and charges.¹⁹³
- (d) The material terms of the agreement should be referred to, especially:
 - (i) that the agreement is regulated by the Act;¹⁹⁴
 - (ii) details of the deposit and further instalments;
 - (iii) reservation of ownership (or the right to repossess);¹⁹⁵
 - (iv) that the item(s) has been delivered to the consumer defendant;
 - (v) terms and conditions and fulfilment thereof;
 - (vi) stipulations with regard to breach of the agreement;
 - (vii) details of the breach of the agreement by the defendant.
- (e) Notification of the consumer by plaintiff in terms of section 129(1)(a) of the Act or compliance with section 86(10).¹⁹⁶
- (f) Compliance with the time periods as prescribed in section 130(1).¹⁹⁷
- (g) Compliance with the various other provisions as provided for by section 130(3).¹⁹⁸

190 Follow ordinary rules of *locus standi* and citation.

191 Follow ordinary rules of jurisdiction as they apply in the high court or the magistrate's court since either of these courts will usually be approached. Schedule 2 item 1 of the Act amended s 29(1) of the Magistrates' Court Act by making it clear that this Court will have jurisdiction over actions arising from the Act.

192 The tenor of the Act is that the agreement must be reduced to writing and contain all the prescribed rights and obligations of the parties but non-compliance will not render it void – see further par 3 4. Note that rule 18(6) of the Uniform Rules of the High Court, requires from a plaintiff to indicate if the contract was entered into orally or in writing and if in writing, to attach a true copy thereof or of the part relied on in the pleading. It is submitted that the same prescription be followed in a magistrate's court although the rules of this court do not provide a similar rule.

193 Although not discussed in this article, it is important to note that the Act contains a fixed list of fees, charges, interest and items that a credit provider may claim from a consumer – see Part C in ch 5. It is also notable that the *in duplum* rule regarding interest has been extended in s 103(5) of the Act. The particulars of claim and the prayers in this regard must thus comply with the provisions of the Act and the credit provider may not charge any amount over and above that provided for by the Act – see in particular s 100 of the Act and for an explanation of the financial matters regulated by the Act, see Otto ch 8.

194 See par 3 above.

195 See the definition of instalment agreement in s 1 of the Act and par 3 2 above.

196 See par 4 2 1 above. It is submitted that the particulars of claim could be amended to indicate compliance with the notification procedure where notice had been complied with but where such notice had not been given, it would amount to a fatal defect in the pleading.

197 See par 4 2 2 above.

198 See discussion below as well as par 4 2 2 above.

- (i) Cancellation of the agreement by plaintiff as a result of defendant's breach and election of plaintiff's contractual remedies.
- (j) Prayers:
 - (i) cancellation or confirmation of cancellation of the agreement;
 - (ii) return of the goods as mentioned in the particulars of claim;
 - (iii) payment of damages to be determined by the court;¹⁹⁹
 - (iv) interest *a tempora morae*;
 - (iv) legal costs;²⁰⁰
 - (v) further and/or alternative relief.

With regard to paragraph (g) it is to be noted that section 130(3)²⁰¹ is clear on the fact that a court may only determine a matter if the requirements of that section are met. This section poses some problems for practitioners in that the parties to the suit will have to convince the court as to compliance with the section. The plaintiff will be confronted with this section when drafting the particulars of claim, when applying for default judgment,²⁰² or the consumer defendant may decide to except to the particulars of claim if they do not refer to these aspects or raise a defence against the claim based on same. It is also to be noted that it is a basic principle of pleading that evidence may not be pleaded, so when the plaintiff applies for default judgment, for instance, he or she will probably have to provide an affidavit dealing with these issues. Where the matter is defended by the consumer, these issues should hopefully become clear from the exchange of pleadings. It is nevertheless submitted that, until a clear practice has emerged, the plaintiff should plead compliance with section 130(3) in so far as he or she is in a position to do so.

4 6 Related Matters

4 6 1 *Interim Interdicts and Attachments of Goods*

The Credit Agreements Act²⁰³ allowed the credit grantor to include a request for an automatic interdict against removal or use of the goods in the summons for cancellation of the contract.²⁰⁴ Pending such cancellation proceedings, section 17(2) of that Act provided for an interdict to regain possession of the goods in the case of an instalment sale transaction where the credit grantor had instituted proceedings for the return of such goods.²⁰⁵

199 It is to be noted that the amount of damages would not necessarily be ascertainable before repossession of the goods. See also s 127 and par 4 2 2 above.

200 See par 4 6 2 below. It is also notable that the *in duplum* rule regarding interest has been extended in s 103(5) of the Act to include legal costs.

201 See par 4 2 2 above regarding these aspects.

202 Regarding the applicability of default judgment in the magistrates' courts in terms of rule 12 of the Magistrates' Court Rules, see Visagie "Collecting your debts against the odds?" 2006 *De Rebus* 21 23 and Otto 92.

203 See s 18.

204 See par 2 2 5 above.

205 See par 2 2 5 above.

Section 131 of the Act is broadly indicative of some acknowledgement of an attachment order within the ambit of repossession proceedings but the purpose of this section seems to be rather to prescribe the procedure in sections 127(2) to (9) and 128 in relation to the eventual regulation of the realisation of such goods.

As indicated above, it remained a question under the Credit Agreements Act whether an interim interdict in the form of an attachment order could be granted outside the ambit of the above provisions and in particular before the time period following a section 11 notice had expired. It must be noted that the Act does not provide for any kind of interim interdict or attachment order directly but that it does not prohibit the granting of such an order either. Section 131, however, acknowledges the granting of an attachment order as part of the repossession of the goods sold – presumably following the cancellation of the contract.²⁰⁶

It will most definitely also become a question in terms of the Act whether the credit provider may apply for an interim interdict or attachment order – for instance to safeguard the goods pending the cancellation proceedings, or in general. Furthermore, it can be accepted that there might be a real need for such protection, for instance where the consumer abandons the property (without restoring it to the credit provider) or where he or she is in the process of disposing of such goods. Otto is of the opinion that although the Act has its own terminology and must be interpreted anew, the courts may follow the various precedents based on former legislation.²⁰⁷ This might well be the case, but in order to cast more light on this issue, the intention of the legislature must firstly be ascertained. In the absence of a specific statutory (interim) remedy, it may be argued that the common law will dictate the substance of the right to an interim interdict that may include an interim attachment order to safeguard the goods under certain circumstances, whilst the procedural rules of the relevant courts will provide the procedural basis for such relief. This should in principle be the case – unless the legislature intended to prohibit such relief or to limit it in some way. In this regard the implications of section 129(1)(b) are all important since it states that the credit provider may as a general rule not *commence any legal proceedings to enforce the agreement before* providing the section 129(1)(a) notice or following the section 86(10) procedure and before complying with the other requirements prescribed in section 130. If an application for interim relief in the form of an interdict or attachment is to be regarded as a legal proceeding to enforce the agreement, such relief could not be considered before the requirements as stated in section 129(1)(b) have been met. A wide reading of the term “legal proceedings to enforce” will probably include such interim relief, whilst a narrow reading based on the argument that the credit provider is not purporting to do debt enforcement will not deem such a request for interim relief to be part of the enforcement.

206 See par 4 3.

207 See Otto 90 and 94–95.

It is thus submitted that a request for interim relief in the form of an interdict to prevent the consumer from carrying out or refraining from performing certain acts regarding the goods, or to attach the goods to safeguard them, must still be based on substantive principles in the sense that the rights of the credit provider are to be infringed since the consumer is in the process of, or about to alienate, damage or destroy the goods.²⁰⁸ In this sense, the credit provider is merely attempting to protect his rights and interests in such goods and such relief must therefore be distinguished from the debt enforcement proceedings.

It must be emphasized that such relief must be based on established substantive principles and procedures. On a procedural point in this regard, it must be noted that section 30(1) of the Magistrates' Courts Act also provides for applications for attachments and interdicts in that court which would thus entitle such a court to hear such applications as well if the matter would otherwise fall within the jurisdiction of the court.

4 6 2 Costs of Debt Enforcement

When the consumer defaults, the credit provider may send him or her a letter of demand to rectify such default. The credit provider is, however, only allowed to claim default administration charges with regard to each such letter that is required by the Act for the purposes of debt enforcement. Such costs are limited to that of a letter of demand sent by registered mail in an undefended matter in terms of the Magistrates' Courts Act, including the reasonable and necessary expenses incurred to deliver such letter.²⁰⁹

With regard to further debt enforcement procedures, the credit provider is entitled to claim collection costs in terms of the Supreme Court Act,²¹⁰ the Magistrates' Court Act, the Attorneys Act²¹¹ or the Debt Collector's Act²¹² depending on the specific Act applicable to the enforcement of the agreement.

A credit provider who has unsuccessfully attempted to resolve a dispute regarding the costs of attachment of property following sections 129 to 131 proceedings, may apply to the court for a special compensation order in respect of any costs in excess of those permitted under section 131 against the consumer, provided that the credit provider complies with the provisions of section 132(1). This section prescribes that the credit provider must first attempt to resolve the dispute directly with the consumer and through alternative dispute resolution in terms of Part A of Chapter 7 of the Act before making such an application.

208 The basic requirements for the granting of an interdict should thus be met. It is submitted that the line of reasoning in *Santambank v Dempers supra* 639 especially at 647C, followed in *BMW Financial Services (Pty) Ltd v Mogotsi supra* 384 387G supports this proposition and should thus be applied in this regard as well.

209 Reg 46.

210 59 of 1959.

211 53 of 1979.

212 114 of 1998.

The court may grant such a compensation order if it is satisfied that

- (a) the consumer knowingly
 - (i) provided false or misleading information to the credit provider in terms of section 97; or
 - (ii) engaged in a pattern of behaviour that was reasonably likely to frustrate or impede the exercise of the credit provider's right to repossess property under section 129 to 131; and
- (b) as a result, the credit provider experienced unreasonable delay or incurred exceptional costs in the exercise of those rights.

4 6 3 The Consumer's Right to Re-instate the Agreement

Section 129(3) entitles the consumer who is in default to re-instate a credit agreement by paying all overdue amounts to the credit provider at any time before the latter has cancelled the agreement.²¹³ Thereafter the consumer may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.²¹⁴ The wording of section 129(3) raises certain questions. First of all, it is difficult to understand how an agreement can be re-instated if it was not cancelled.²¹⁵ Secondly, in order to obtain an attachment order the agreement has to be cancelled. But the consumer only has the right to re-instate the agreement if the agreement has not been cancelled yet. It therefore does not make sense to refer to the consumer's right to resume the possession of the property that had been repossessed by the credit provider *pursuant to an attachment order*.²¹⁶ It is our submission that section 129(3) was poorly drafted and needs to be revisited by the legislature.

5 Conclusion

This article dealt with some practical aspects regarding the cancellation of an instalment agreement in terms of the National Credit Act against the backdrop of the procedures provided for by the former Credit Agreements Act.

213 As well as the credit provider's permitted default charges (discussed in par 4 6 2 above) and reasonable costs of enforcing the agreement up to the time of the re-instatement.

214 However, s 129(4) does not allow a consumer to re-instate a credit agreement after *inter alia* the sale of property pursuant to an attachment order or the surrender of property in terms of s 127.

215 We submit that a reference to the right of the consumer to *re-instate* the contract is not correct if the consumer is not allowed to make use of such right in the event of cancellation of the contract as well. Although s 12 of the Credit Agreements Act allowed the consumer to re-instate a credit agreement before it had been cancelled, it also allowed the consumer to re-instate the agreement even after it had been cancelled. This made sense as the rights and obligations of the parties to the cancelled contract were revived by means of the re-instatement. See Otto 98.

216 *Ibid.*

The Credit Agreements Act contained specific provisions to deal with the cancellation of an instalment sale transaction in terms of that Act and it also contained specific provisions that dealt with interim interdicts and attachments pending the cancellation procedures.²¹⁷

The enforcement procedures of the Act, however, first need some interpretation with regard to the question whether they apply to cancellation at all. It is our view that the enforcement procedures of the Act do apply to cancellation as well.²¹⁸ Although the Act is silent with regard to interim interdicts and attachments, it is submitted that such relief can also be applied for where the actions of the consumer threaten the rights of the credit provider in the goods sold.²¹⁹

The Act also provides for a type of notice before the debt enforcement procedure may ensue. There are, however, different time periods involved than those provided for by the Credit Agreements Act.²²⁰

The Act also prescribes certain conditions under which a court may not determine a debt enforcement procedure.²²¹ This provision will cause difficulty in practice since it will clearly become the duty of the parties to provide the required information to the court but the Act is silent on the procedure to be followed in this regard.

With regard to the costs of debt enforcement, the Act limits such costs but it contains a provision that may be used by the credit provider to claim further compensation regarding the costs of attachment of property in terms of sections 129 to 131 under exceptional circumstances provided for by section 132.²²²

It is our final submission that the Act affords equal protection to the consumer regarding the exercise of the contractual rights by a credit provider to cancel a credit agreement in the event of breach of contract by the consumer than its immediate predecessor, the Credit Agreements Act. However, the provisions in the Act that deal with this aspect are to some extent less clear than the repealed provisions²²³ and judicial interpretation thereof will have to be awaited.

217 See paras 2 2 3 to 2 2 5.

218 See par 4 1.

219 See par 4 6 1.

220 See paras 2 2 3 and 4 2 1.

221 See par 4 2 2.

222 See par 4 6 2.

223 See paras 2 and 4 2.